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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 606.

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama of August 30, 1962 (App. B of Petition, pp. 33-78) is reported in 144 So. 2d 25. The opinion of the trial court denying petitioner's motion to quash service (App. B of Petition, pp. 79-89) is unreported.

JURISDICTION.

Petitioner has sought to invoke this Court's jurisdiction under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED.

1. Does a newspaper corporation have a constitutionally guaranteed absolute privilege to defame an elected city official in a paid newspaper advertisement so that the cor-

poration is immune from a private common law libel judgment in a state court in circumstances where, because of the admitted falsity of the publication, the newspaper is unable to plead or prove state afforded defenses of truth, fair comment, privilege or retraction (to show good faith and eliminate punitive damages), and where the corporation has retracted the same false material for another admittedly "on a par" with the city official?

2. When the only claimed invasion of a corporation's constitutional rights is that a city official successfully sued it for damages in a private civil action for libel in a state court in circumstances described in Question 1, and when the corporation does not contend that the state trial proceedings have been unfair, does the corporation bring to this Court a federal question subject to review within this Court's certiorari jurisdiction?

3. Are libelous utterances in a paid newspaper advertisement within the area of constitutionally protected speech and press?

4. When an admittedly false newspaper advertisement published in circumstances described in Question 1 charges that city police massively engaged in rampant, vicious, terroristic and criminal actions in deprivation of rights of others, is a state court holding in a private common law libel action that such an utterance is libelous as a matter of state law—leaving to the jury the questions of publication, identification with the police commissioner, and damages—an infringement of the newspaper's constitutional rights so as to present any federal question for review on certiorari in this court?

5. When a paid newspaper advertisement published in circumstances described in Question 1 contains admittedly false charges described in Question 4 about police action in a named city, may this Court consistently with its decisions and the 7th Amendment review on certiorari a state

jury finding, in a trial concededly fair, that the publication is "of and concerning" the city police commissioner whose name does not appear in the publication, and an award of general and punitive damages to him, when this state jury verdict embodied in a final state judgment has been approved by the state's highest appellate court?

6. May this Court consistently with its decisions and the 7th Amendment re-examine facts tried by a state jury in a trial concededly fair, when those findings have been embodied in a final state judgment affirmed by the highest state appellate court, and when review is sought on assertions that the verdict is wrong and the general and punitive libel damages merely excessive?

7. When a foreign corporation makes a general appearance in a private state civil action against it, according to state law consistent with the majority view of all states, is there an adequate independent state ground as to jurisdiction over this foreign corporation so as to bar certiorari review in this Court?

8. Even if there had been no general appearance as described in Question 7, when a foreign newspaper corporation continuously and systematically gathers news by resident and transient correspondents, solicits advertising in person and by mail, and distributes its newspapers for sale in the forum state, and when some of these activities are incident to the cause of action in suit, has this foreign corporation sufficient contacts with the forum state so that suit against it is fair in accordance with decisions of this Court so explicit as to leave no room for real controversy?

STATUTES INVOLVED.

Statutes referred to in this brief are contained in an appendix hereto.

STATEMENT.

In the New York Times of March 29, 1960, there appeared a full-page advertisement, "warmly endorsed" by the four petitioners in No. 609, entitled, "Heed Their Rising Voices."[1] Charging generally "an unprecedented wave of terror," the advertisement said of Montgomery:

> "In Montgomery, Alabama, after students sang 'My Country 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> . . . . . .
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a **felony** under which they could imprison him for **ten years**."

Respondent, police commissioner of Montgomery, asked $500,000 as damages for this libel from the New York Times and the four "warm endorsers."

After a lengthy hearing the trial court held on August 5, 1960, that the New York Times was amenable to suit in Alabama. It had made a general appearance the court found. And, moreover, its business activities in Alabama, some of which had given rise to the cause of action, were

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[1] App. C of Petition, p. 105.

sufficient contacts under due process standards to permit service on a Times string correspondent residing in Alabama, and on the Secretary of State under the Alabama Substituted Service Statute[2] (App. B of Petition, pp. 80-89).

After its demurrers had been overruled, the Times filed six separate pleas to the complaint. Although truth regardless of motive is a complete defense to a libel suit in Alabama (see *infra*), the Times and its co-defendants filed no plea of truth. Although privilege and fair comment are defenses in Alabama in appropriate circumstances (see *infra*), the Times and its co-defendants did not plead these defenses. At the conclusion of the trial a jury returned a verdict against all defendants for $500,000, and the trial court entered a judgment against all defendants in this amount.[3] Petitioner does not assert here any due process defects in these trial proceedings, and does not attack the motives and conduct of the jury.

The Times filed a motion for new trial, which was overruled; the petitioners in No. 609 filed motions for new trial, but allowed them to lapse.

The Alabama Supreme Court affirmed the judgment as to all defendants.

The Times complains in this Court: (1) The holdings of the Alabama courts that the publication was libelous *per se* and the jury verdict that it was "of and concerning" respondent abridged its guaranties under the 1st and 14th Amendments, and (2) it was not amenable to suit in Alabama.

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[2] Title 7, § 199 (1), Code of Alabama. The Times has conceded throughout adequate notice and opportunity to defend.

[3] Of course, this joint judgment is not collectible more than once. Since a separate Petition has been filed by the individual defendants, the facts giving rise to their liability will be related in a separate brief in opposition.

I.

Since the Times has told this Court that the whole libel rests on two discrepancies—mere "exaggerations or inaccuracies"[4] in the course of an "impersonal"[5] discussion "plainly" not meant as an attack on any individual,[6] respondent will state this case so that the Court may consider the petition in accurate context.

This lawsuit arose because of a wilful, deliberate and reckless attempt to portray in a full-page newspaper advertisement, for which the Times charged and was paid almost $5,000, rampant, vicious, terroristic and criminal police action in Montgomery, Alabama, to a nationwide public of 650,000. The goal was money-raising. Truth, accuracy and long-accepted standards of journalism were not criteria for the writing or publication of this advertisement. The defamatory matter (quoted R. 1698-1699) describes criminal police action because some college students innocently sang "My Country 'Tis of Thee" from the Alabama State Capitol steps. The innocent singers were expelled from school; police ringed their campus by truckloads armed with shotguns and tear gas; and their dining hall was padlocked to starve the students into submission. All statements charge violation of the students' rights.

The Times is not candid when it tells this Court (Petition, pp. 5 and 17) that respondent testified that the "padlock" charge did not refer to him but was a matter for the State Department of Education. Respondent, when permitted to given an uninterrupted answer on this point, stated (R. 1841):

> "As a part of the responsibility of the Police Commissioner and the Commissioner of Public Affairs, it

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[4] Petition, p. 17.

[5] Ibid.

[6] Petition, p. 16.

is our responsibility to maintain law and order here in Montgomery whether it is at the campus or elsewhere. As far as the expulsion of the students is concerned, that responsibility rests with the State Department of Education."

The perpetrators of those alleged barbarisms were the same persons who had intimidated Martin Luther King; bombed his home; assaulted his person; and arrested him. All statements charge criminal conduct. Although the Petition (pp. 5-6 and 17-18) tells this Court that the pronoun, "they," does not point to respondent, the Times' own witness, Gershon Aaronson, conceded that the word, "they," as it appeared repeatedly in the quotation from the ad, referred to the same persons (R. 1871). Accordingly, the same police and the same police commissioner committed or condoned these alleged acts. And a jury unanimously agreed with Aaronson.

The ordinary reader of this ad was bound to draw the plain meaning that such shocking conditions were the responsibility of the person charged with the administration of the Montgomery Police Department—respondent and the other two city commissioners. Any other conclusion is impossible. The Times itself can suggest no other reference except to the police generally, and police are under the direct control and supervision of respondent. Indeed, the petition of the individuals in No. 609 (p. 5) concedes that "the advertisement commented on the activities of unnamed governmental authorities in the cities in . . . Alabama . . ."

A description of such conduct, at war with basic concepts of decency and lawful government, inevitably evokes contempt, indignation, and ridicule for the person charged with the administration of police activities in Montgomery. And obviously this was the precise intent of the

authors of the advertisement. One of them, John Murray, so testified.[7]

Significantly, none of the Times' witnesses, and none of the petitioners in No. 609, all of whom testified, presented any evidence designed to show that the statements from the ad were true. Certainly, the individual petitioners in No. 609, two of whom lived in Montgomery, had no reason to withhold testimony harmful to respondent.

The reference to respondent as police commissioner is clear from the complaint. In addition, the jury heard the testimony of a newspaper editor (R. 1722, et seq.); a real estate and insurance man (R. 1733, et seq.); the sales manager of a men's clothing store (R. 1754, et seq.); a food equipment man (R. 1755, et seq.); a service station operator (R. 1769, et seq.); and the operator of a truck line for whom respondent had formerly worked (R. 1784, et seq.). Each of these witnesses stated that he associated the statements with respondent, and that if he had be-

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[7] "Q. (After reading the first paragraph quoted in the complaint) Was that the way that paragraph was when you first got it with the memorandum or did you give it that added touch for appeal?

"A. Well, it would be a little difficult at this time to recall the exact wording in the memorandum but the sense of what was in the memorandum was certainly the same as what is in here. We may have phrased it a little differently here and there.

"Q. I see. Your purpose was to rev it up a little bit to get money, I take it.

"A. Well, our purpose was to get money and to make the ad—to project it in the most appealing form from the material we were getting.

"Q. Whether it was accurate or not really didn't make much difference, did it?

"A. Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been—I mean we would have stopped to question it. I mean we would have stopped to question it. We had every reason to believe it" (R. 1941-1942).

lieved the statements to be true, he would have considered such conduct reprehensible in the extreme."[8]

Undoubtedly the demonstrable falsity of the statements prevented pleas of truth or privilege or fair comment. Although the petition in this Court does not reveal the fact, the Times published a retraction of the same paragraphs for Governor Patterson on May 16, 1960 (R. 1714-1715 and 1408-1411):

> "Since publication of the advertisement, The Times made an investigation and consistent with its policy of retracting and correcting any errors or misstatements which may appear in its columns, herewith retracts the two paragraphs complained of by the Governor."

The Times asked its Montgomery string correspondent, McKee, for an investigation. On April 14, 1960, five days before suit was filed, McKee advised that the statements in the first quoted paragraph of the ad were false; and that King had been arrested twice by the Montgomery police for loitering and speeding and twice by the Sheriff's office for violation of the State boycott law and on charge of income tax falsification—a charge on which he was subsequently acquitted. Nevertheless, the Times, instead of retracting, wrote respondent that with the exception of the padlocking statement the rest of the quoted material was "substantially correct" (R. 1708).

Later the Times directed another investigation by its regional correspondent, Claude Sitton. While the Times now speaks in this Court of "discrepancies" and "inaccuracies" in two instances, Sitton reported on May 4,

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[8] One stated, for example: "I don't think there is any question about what I would decide. I think I would decide that we probably had a young Gestapo in Montgomery" (R. 1766).

1960, that the first quoted paragraph of the advertisement "appears to be virtually without any foundation" (R. 1712). There was no suggestion of involvement of respondent or any other city commissioner, or public employee under their charge, in the matters in the second quoted paragraph.

The Times then retracted for Governor Patterson, but not for respondent. The Times attempted to explain its inconsistency:

> "The defendant . . . felt that on account of the fact that John Patterson held the high office of Governor of the State of Alabama and that he apparently believed that he had been libeled by said advertisement in his capacity as Governor of the State of Alabama, the defendant should apologize" (R. 1714).

When confronted with this answer to interrogatories, Harding Bancroft, secretary of The New York Times, could give no reason for the different treatment of Governor Patterson and respondent. They were "on a par." But there was a retraction for Patterson and not for respondent (R. 1905-1906).

Undisputed trial testimony showed that respondent and the other commissioners and the Montgomery police had nothing to do with the King bombings; that a city detective had helped to dismantle a live bomb which had been thrown on King's front porch (R. 1808); and that the department had exerted extraordinary efforts to apprehend the persons responsible (R. 1809-1810). The occurrence of this event before respondent took office simply compounds the libelous nature of this advertisement which seeks to portray such matters as current actions which "they" took. The ordinary reader, chronologically unsophisticated, would clearly associate the acts with the current city government.

Another police officer testified without contradiction that no one had assaulted King when he had been arrested for loitering outside the courtroom (R. 1816).

Frank Stewart, State Superintendent of Education, testified without contradiction that students had not been expelled from school for singing on the capitol steps (R. 1823-1824).

The uncontroverted testimony of falsity was so overwhelming that counsel for the Times repeatedly brought out from witnesses that the statements quoted from the ad were not true. Moreover, he stated that truth was not in issue in the case because it had not been pleaded. (A compendium of counsel's statements is in Appendix B of this brief, p. 48). Counsel would not and could not have made such statements if the quoted portions of the ad had been true or if they had contained only a few "discrepancies" or "exaggerations."

Undeterred, however, in the teeth of these judicial admissions, Harding Bancroft maintained to the end an equivocal position about the correctness of the ad, with the exception of the padlocking statement.[9]

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[9] When asked whether the Times took the position that the ad's statements, with this exception, were "substantially correct," Bancroft first said: "I think it is a pretty hard question to answer" (R. 1908). Then, the Times . . . "doesn't know anything more than what is set forth in these two responses which our stringer and correspondent there, which are annexed to the Answers to the Interrogatories and we don't have additional knowledge to that" (R. 1909). Next: "I really think I have to answer the question by saying I don't know" (R. 1909). Then: "[I]t is awfully difficult to define what The Times thinks," but The Times' lawyers had seemed to indicate on April 15, 1960, that the statements were substantially correct (R. 1910-1911). He concluded (R. 1912):

> "I find it terribly difficult to be able to say that The Times, as such, believes something is true or is not true. Now, all I can tell you is what the sources of The Times' knowledge are, and the sources are The Times' knowledge—the com-

Because of this testimony, when the Times six months before had retracted the same statements on the basis of the same investigation as "errors and misstatements" (R. 1714-1715, 1408-1411), the court below characterized Bancroft's performance as "cavalier ignoring of the falsity of the advertisement" which surely impressed the jury "with the bad faith of the Times, and its maliciousness inferable therefrom" (144 So. 2d 25 at 51; App. B of Petition, p. 77).

Sullivan himself testified that the matters contained in the ad were false (R. 1829-1833); that the statements reflected "upon my ability and integrity, and it has certainly been established here that they are not true" (R. 1837).

The bombing statement "referred to me and to the Police Department of the City and the City Commissioners" (R. 1842). Similarly, the other matters contained in the second quoted paragraph of the ad related to him "by virtue of being Police Commissioner and Commissioner of Public Affairs."

When asked on cross-examination whether he felt that the ad had a "direct personal reference" to him, his answer was, and it is the simple answer which any normal reader of the ad would give:

> "It is my feeling that it reflects not only on me but on the other Commissioners and the community . . . When it describes police action, certainly I feel it reflects on me as an individual" (R. 1849).

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plete sources as far as I know, are the two annexes attached to the Answers to the Interrogatories. Now, if you asked me would I use the words 'substantially correct,' now, I think I probably would, yes. The tenor of the content, the material of these two paragraphs in the ad which have been frequently read here are not substantially incorrect. They are substantially correct. Now, what sort of words I can use to give you an answer that would satisfy you, I don't know."

Moreover:

> "I have endeavored to try to earn a good reputation and that's why I resent very much the statements contained in this ad which are completely false and untrue" (R. 1846).

The circumstances under which this ad was cleared for publication show a striking departure from the Times' usual meticulous screening process. So that it will print only what is "fit to print," the Times has codified an elaborate set of "advertising acceptability standards" (R. 1716-1720), designed "to exclude misleading, inaccurate, and fraudulent advertisements and unfair competitive statements in advertising. The chief purpose of this policy of The Times is to protect the reader and to maintain the high standards of decency and dignity in its advertising columns which The Times has developed over the years."

To be as charitable as possible, it is remarkable that no person connected with The Times investigated charges that as part of "a wave of terror," public officials in Montgomery, because students sang "My Country 'Tis of Thee" from the Capitol steps, expelled the students from school; ringed their campus with truckloads of police armed with shotguns and tear gas; padlocked dining halls to starve them into submission; and thereby maintained continuity with earlier days in which they had bombed King's home, assaulted his person, and arrested him on baseless charges.

Over sixty names appeared on the ad; none of these persons was contacted. A regional correspondent in Atlanta, who the Times admits had written news reports about racial difficulties in Montgomery, was not questioned. The Times had a string correspondent in Montgomery. It directed him to give an immediate report on the demand for retraction. But he was not asked for prior information or investigation.

In its answer to interrogatories, the Times specified sixteen contemporaneous news stories of its own as "relating to certain of the events or occurrences referred to in the advertisement" (R. 1704). Aaronson, Redding, and Bancroft—the three Times witnesses—had never bothered to look at any of this news material before publishing the ad.

Aaronson, an employee on the national advertising staff, who first received the ad, testified that he did not read it (R. 1866), but simply "scanned it very hurriedly" (R. 1867).

Because he knew nothing which would lead him to believe that these monstrous statements were false (R. 1884), Vincent Redding, head of the Advertising Acceptability Department, did not check with any of the signers of the ad; or with the regional correspondent in Atlanta; or with the string correspondent in Montgomery; or with the sixteen newspaper stories on file in his office (R. 1889-1891):

> "Q. Mr. Redding, wouldn't it be a fair statement to say that you really didn't check this ad at all for accuracy?
>
> "A. That's a fair statement, yes" (R. 1891).

Testimony of John Murray, one of the authors of the ad, and erstwhile Hollywood "scenarist" and Broadway lyricist (R. 1943), describing the manner in which the ad was composed, has been quoted previously. (Footnote 7, *supra*).

Thus, this "appealing" congeries of monstrous and now undefended falsehoods was sent to The New York Times. Upon payment of almost five thousand dollars, it was published without any investigation as a full-page advertisement in The New York Times of March 29, 1960. Six hundred and fifty thousand copies of it circulated to the nation as part of "All the news that's fit to print." And its purveyors sat back to await the financial return on their investment in "free speech."

II.

General Appearance. Petitioner, by moving to dismiss the action because the Alabama court was said to have no jurisdiction of the subject matter, made a general appearance in this case and thereby consented to the jurisdiction of the Alabama courts over its corporate person. This was the holding of both courts below. In addition, the trial court held that by bringing a mandamus action in the Supreme Court of Alabama unrelated to questions of personal jurisdiction, the Times had compounded its general appearance (R. 41-42; App. B of Petition, p. 81). The holdings below, as will be demonstrated, accord with Alabama cases as well as those in a majority of the states.

The Times calls this general appearance "involuntary" (Petition, p. 23). But the Times in its brief in the Alabama Supreme Court (p. 54) said:

> "Accordingly, while the motion made it clear that the only grounds for the motion were the defects in the mode of service, the prayer asserted the consequences of these defects—a lack of jurisdiction not only over the person but also over the subject matter."

Validity of service of process on The New York Times. The courts below held that service on the string correspondent, McKee, and on the Secretary of State were valid. The trial court held that the Times had been sued on a cause of action "incident to" its business in Alabama (R. 45); and the "manifold contacts which The Times maintains with the State of Alabama" make it amenable to this process and suit in the Alabama courts, commenced by service on McKee and on the Secretary of State, "regardless of its general appearance" (R. 42). The trial court found:

> ". . . an extensive and continuous course of Alabama business activity—news gathering; solicitation of advertising; circulation of newspapers and other

products. These systematic business dealings in Alabama give The Times substantial contact with the State of Alabama, considerably in excess of the minimal contacts required by the Supreme Court decisions. The Times does business in Alabama" (R. 46).

The Alabama Supreme Court affirmed on this point, after extensive findings regarding the business activities of the Times in Alabama (144 So. 2d 25 at 29-35; App. B of Petition, pp. 38-49). It adopted, as had the trial court, the test of **Consolidated Cosmetics v. D-A Publishing Company**, 186 F. 2d 906, 908 (7th Cir. 1951):

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

The court below concluded (144 So. 2d at 34; App. B of Petition, pp. 47-48):

> "The evidence shows that The Times sent its papers into Alabama, with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec. 25, Code of Alabama 1940; 2 Williston on Sales, Sec. 279 (b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.
>
> "The Times or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procur-

ing in substantial amounts advertising to appear in The Times.

"Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, The Times had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that McKee was not devoting his full time to the service of The Times is 'without constitutional significance.' Scripto, Inc. v. Carson, Sheriff et al., 362 U. S. 207."

Moreover, the court below found (144 So. 2d at 35; App. B of Petition, p. 49):

"In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of The Times, and its newspapers were regularly sent into Alabama. Advertising was solicited in Alabama. Its correspondent McKee was called upon by The Times to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of The Times done in Alabama."

The exhaustive findings of fact contained in the opinions of both Alabama courts are fully substantiated in the record. In a qualitative sense, the test of **International Shoe Co. v. Washington**, 326 U. S. 310, 319-320, these decisions below were clearly correct. The Times from 1956 through April, 1960, conducted an extensive and continuous course of business activity in Alabama. The annual revenue was over twice as great as the $42,000 which this Court found sufficient to establish adequate Florida contacts in **Scripto v. Carson**, 362 U. S. 207.

ARGUMENT.

I.

The New York Times, perhaps the nation's most influential newspaper, stooped to circulate a paid advertisement to 650,000 readers—an advertisement which libeled respondent with violent, inflammatory, and devasting language. The Times knew that the charges were uninvestigated and reckless in the extreme. It failed to retract for respondent with subsequent knowledge of the falsity of the material in the advertisement. Yet it retracted as misleading and erroneous the same defamatory matter for another "on a par".

Petitioner was unable to plead truth; or fair comment; or privilege. Alabama provides these classic defenses so that the press may be free within the rubric of its libel laws.[10]

The Times' trial attorneys conceded that truth was not in issue; and made plain to the jury that the material was so patently false as to be unbelievable in the community. No defendant attempted to introduce testimony to substantiate the charges.

The Times does not claim that it was denied a fair and impartial trial of the libel action. The petition raises no question of procedural due process. Nor does it seek review of a federal question—substantial or otherwise. For libelous utterances have never been protected by the Fed-

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[10] Substantial truth in all material respects is a complete defense if specially pleaded. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888; *Kirkpatrick v. Journal Publishing Company*, 210 Ala. 10, 97 So. 58; *Alabama Ride Company v. Vance*, 235 Ala. 263, 178 So. 438.

Privilege and fair comment, too, are defenses, if specially pleaded. *Ferdon v. Dickens*, supra; *W. T. Grant v. Smith*, 220 Ala. 377, 125 So. 393.

A retraction completely eliminates punitive damages. Title 7, Sections 913-917, Alabama Code (App. C. p. 53).

eral Constitution. Throughout its entire history, this Court has never held that private damage suits for common law libel in state courts involved constitutional questions.[11]

Moreover, commercial advertisements are not constitutionally protected as speech and press, since there is no real restraint on speech and press where commercial activity is involved. **Valentine v. Chrestensen**, 316 U. S. 52, 54; **Breard v. City of Alexandria**, 341 U. S. 622, 643.[12]

This Court last term in **Abernathy v. Patterson**, 368 U. S. 986, declined to review a decision of the Court of Appeals, 295 F. 2d 452, 456-457, which had held this very publication unprotected constitutionally as a libelous utterance. The Court of Appeals stated that the only constitutional claim could be one relating to the conduct of the trial.

In 1804, Thomas Jefferson wrote to Abigail Adams, referring to his condemnation of the Sedition Act of 1798:

> "Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the U. S. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the Constitution according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever

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[11] *Beauharnais v. Illinois*, 343 U. S. 250; *Near v. Minnesota*, 283 U. S. 697, 715; *Konigsberg v. State Bar of California*, 366 U. S. 36, 49-50; *Roth v. U. S.*, 354 U. S. 476, 483; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572.

[12] Lower Federal court decisions accord. *Pollak v. Public Utilities Commission*, 191 F. 2d 450, 457 (D. C. Cir. 1951); *E. F. Drew & Co. v. Federal Trade Commission*, 235 F. 2d 735, 740 (2d Cir. 1956), cert. den. 352 U. S. 969.

asserted the right of the states, and their exclusive right, to do so."[13]

A century and a quarter later, Justices Holmes and Brandeis, founding fathers of "clear and present danger", joined Chief Justice Hughes, who spoke for the Court in **Near v. Minnesota**, 283 U. S. 697, 715:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."

Twenty years thereafter, this Court upheld an Illinois criminal group libel statute which had been applied to one who had distributed a pamphlet charging that Negroes as a class were rapists, robbers, carriers of knives and guns, and users of marijuana. **Beauharnais v. Illinois**, 343 U. S. 250, 266:

> "Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'"

Since **Beauharnais**, as the table contained in Appendix A shows, this Court has declined to review forty-four libel cases coming from the state and federal courts. It has reviewed three. Two of them[14] resulted in a holding that certain lower echelon federal executive personnel had an absolute privilege. The third[15] held that a radio and

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[13] Quoted in *Dennis v. U. S.*, 341 U. S. 494, 522, n. 4, and in *Beauharnais v. Illinois*, 343 U. S. 250, 254, n. 4.

[14] *Barr v. Matteo*, 360 U. S. 564; and *Howard v. Lyons*, 360 U. S. 593.

[15] *Farmers Union v. WDAY, Inc.*, 360 U. S. 525.

television station, which gave equal time to all political candidates because of the dictates of § 315 of the Federal Communications Act, was absolutely immune, by virtue of the same act, from state libel suits growing out of any such broadcasts.

The Times asserts this absolute privilege to defame all public officials—even in paid advertisements; even when the defamation renders the classic defenses of truth, fair comment and privilege unavailable; even when there is no retraction to show good faith. The Times urges this Court to protect such a fancied privilege. The obvious consequence of such a holding would be the confiscation of the rights of those defamed to assert their traditional causes of action for defamation in state courts.

Clearly, Congress and this Court did not find such a constitutional privilege, hence Section 315 and **Farmers Union v. WDAY**, 360 U. S. 525. The very reason for such Congressionally conferred immunity was the "widely recognized" existence of causes of action for libel by defamed candidates for public office "throughout the states" (360 U. S. 525, at 535). This Court found that Congress had given immunity because broadcasters would have too much difficulty determining whether a particular equal time broadcast was defamatory in terms of relevant state law. 360 U. S. 525, at 530. Clearly this Court did not decide **WDAY** on an assumption that the Constitution already provided such immunity absent a "clear and present danger."

Beauharnais, 343 U. S. 250, at 266, disposes of petitioner's "clear and present danger" cases (pp. 13-15) involving criminal prosecutions for breach of peace, criminal syndicalism and contempt of court.[16] Indeed, the back-

[16] *Cantwell v. Connecticut*, 310 U. S. 296, 308; *DeJonge v. Oregon*, 299 U. S. 353; *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331; *Craig v. Harney*, 331 U. S. 367; *Wood v. Georgia*, 370 U. S. 375.

ground of one of them, **Pennekamp v. Florida**, 328 U. S. 331, 348-349, sharply distinguishes these cases from the one at bar. This Court told Pennekamp that even those hardy judges described by petitioner could bring private suits for defamation in state courts. "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."

Pennekamp—editor of the **Miami Herald**—presumably ignored this warning, and assumed erroneously, as does The New York Times, that he had an absolute privilege to level not only fair but false and defamatory criticism at public officials without the risk of private libel suit. Pennekamp discovered that he was wrong when his paper libeled a prosecuting attorney who recovered $100,000 in damages. **Miami Herald v. Brautigam**, 127 So. 2d 718. Even though Pennekamp and his paper were able to plead fair comment and truth, and claimed the editorial expression as their own,[17] this Court declined to review despite the same 1st and 14th Amendment arguments which the Times advances in this Petition. 30 U. S. Law Week 3287.

Two of this Court's greatest figures rejected a contention that newspapers should have an absolute privilege to defame public officials and a consequent absolute immunity from private libel suits for such defamation. Mr. Justice, then Judge Holmes, in **Burt v. Advertiser Company**, 154 Mass. 238, 28 N. E. 1, 4, upholding a trial court charge to the jury that newspaper statements of fact, as distinguished from opinion, if false, were not privileged, said:

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[17] In the Supreme Court of Alabama, the Times literally disavowed the advertisement as its utterance: "The ad was not written by anyone connected with The Times; it was not printed as a report of facts by The Times, nor as an editorial or other expression of the views of The Times" (Reply Brief, p. 12).

"But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case.

"If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

Mr. Chief Justice, then Judge Taft, upholding a similar trial court charge in **Post Publishing Company v. Hallam**, 59 F. 530, 540 (6th Cir. 1893), wrote:

"[I]f the [absolute] privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good."

The Times cites no authority holding that the Federal Constitution accords it an absolute privilege to defame a public official. The Times' policy arguments are equally pallid.

The Times complains that the court below has characterized as libelous per se a publication which is false, which tends to injure the person defamed in his reputation, which brings him into public contempt as an official,

and which charges him with crime. Such a standard, the Times argues, is a common law concept of the most general and undefined nature. But this Court in **Beauharnais v. Illinois**, 343 U. S. 250, 257, n. 5, approved Judge Learned Hand's definition of libel in **Grant v. Reader's Digest**, 151 F. 2d 733, 735 (2d Cir.), "in accordance with the usual rubric, as consisting of utterances which arose 'hatred, contempt, scorn, obloquy or shame', and the like." Such a definition, this Court held, was a familiar—not a general and undefined—common law pronouncement.

The Times' objection that punitive damages in libel should not be imposed to deter the libeler and others like him from similar misconduct does not square with **Beauharnais**, 343 U. S. 250, 263. The Alabama test is precisely that of **Reynolds v. Pegler**, 123 F. Supp. 36, 38, affirmed 223 F. 2d 429 (2d Cir.), cert. den. 350 U. S. 846.[18] There the jury brought back one dollar compensatory damages and $175,000 in punitive damages.

Recently a New York Court refused to disturb a verdict of $3,500,000, of which the sum of $2,500,000 was punitive damages, against a publication and another, for stating that plaintiff was linked to a Communist conspiracy. **Faulk v. Aware, Inc.**, 231 N. Y. S. 2d 270, 281:

> "In libel suits, of course, punitive damages have always been permitted in the discretion of the jury.

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[18] "Punitive or exemplary damages are intended to act as a deterrent upon the libelor so that he will not repeat the offense, and to serve as a warning to others. They are intended as punishment for gross misbehavior *for the good of the public* and have been referred to as 'a sort of hybrid between a display of ethical indignation' and the imposition of a criminal fine.' *Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit.* The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another" (Emphasis supplied; footnotes omitted).

The assessment of a penalty involves not only consideration of the nature and degree of the offense but the higher moral consideration that it may serve as a deterrent to anti-social practices where the public welfare is involved. The jury, representing the community, assesses such a penalty as, in its view, is adequate to stop the practices of defendants and others having similar designs."

The New York Times itself commended the **Faulk** verdict—seven times as great as the one at bar—as having a "healthy effect."[19]

Another commentator has observed that in England "the survival of honorific values and standards of communal decency keep defamation at a minimum and subject it, when it raises its head, to staggering jury verdicts." Riesman, **Democracy and Defamation**, 42 Columbia L. Rev. 727, 730.

It is appropriate here to remind this Court that it has always considered itself barred by the 7th Amendment from setting aside state and federal jury damage awards as inadequate or excessive. **Chicago, B. & Q. v. Chicago**, 166 U. S. 226, 242-243 ($1 verdict in condemnation proceeding); **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474 (and cases cited); **St. Louis, etc. Ry. Co. v. Craft**, 237 U. S. 648; **Maxwell v. Dow**, 176 U. S. 581, 598; **Southern Ry. v. Bennett**, 233 U. S. 80, 87; **Herancia v. Guzman**, 219 U. S. 44, 45; **Eastman Kodak v. Southern Photo Materials**, 273 U. S. 359; **L. & N. v. Holloway**, 246 U. S. 525; cf. **Neese v. Southern Ry.**, 350 U. S. 77. See also, **Justices v. U. S. ex rel. Murray**, 9 Wall. 274, said by this Court to be one of many cases showing "the uniform course of decision by this Court for over a hundred years

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[19] Editorial of June 30, 1962, p. 18.

in recognizing the legal autonomy of state and federal governments." **Knapp v. Schweitzer**, 357 U. S. 371, 378-379.

The Times objects because the court decided the question of whether the publication was libelous per se. But the Times' contention opposes **Baker v. Warner**, 231 U. S. 588, 594. And see **Beauharnais**, 343 U. S. 250, 254:

> "Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other states."

The Times complains because Alabama presumes general damages, including the uncertain future damage of loss of job, from a publication which is libelous per se. This is the law generally.[20]

This publication charged a public official in devastating fashion with departing from all civilized standards of law and decency in the administration of his official duties. The correctness of the determination below that it is libelous *per se* is underscored by **Sweeney v. Schenectady Union Publishing Company**, 122 F. 2d 288, affirmed 316

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[20] Commentators precisely oppose the Times' view. See Note, *Exemplary Damages in the Law of Torts*, 70 Harvard L. Rev. 517, 531 (1957), where it was observed that a requirement of correlation between actual and punitive damages "fails to carry out the punitive function of exemplary damages, since it stresses the harm which actually results rather than the social undesirability of the defendant's behavior."

See, *Developments in the Law—Defamation*, 69 Harvard L. Rev. 875, at 934, et seq. And see *Ibid.* at 937: "Because defamation is a tort likely to cause substantial harm of a type difficult to prove specifically, courts will allow a substantial recovery of general damages on a presumption of harm even though the plaintiff offers no proof of harm." See also 3 *Restatement of Torts*, § 621, pp. 313-316.

U. S. 642. There a statement that a Congressman opposed a federal judicial appointment because of anti-Semitism was held libelous per se as a matter of law.[21]

Clearly the court below has correctly applied the Alabama common law of libel—law which accords in all relevant particulars with that of many other states. No federal question is presented for review.

II.

Equally untenable is the Times' assertion that a federal question is presented to this Court because the jury was wrong in finding that the advertisement was "of and concerning" respondent; and, because, even if the reference was sufficient, "the whole libel rests on two discrepancies" which are mere "exaggerations or inaccuracies" (Petition, p. 17).

Again the Times seeks to overturn imbedded constitutional principles. This case has been tried in a state court according to admittedly proper court procedure, and a jury decided has the facts. This Court simply does not exercise certiorari jurisdiction to go behind these factual determinations and review a state court judgment, entered on a jury verdict and affirmed by the highest state appellate court. **Chicago, B. & Q. R. Co. v. Chicago**, 166 U. S. 266 at 242-243; **United Gas Public Service Co. v. Texas**, 303 U. S. 123, 152-153 (Black, J. concurring); **Fairmount**

[21] Cases hold libelous *per se* statements that a person appeared as a legislative representative for the Massachusetts Communist Party (*Grant v. Reader's Digest*, 151 F. 2d 733) (2d Cir. 1945); that an organization "flirted with communism" (*Pl. D. A. v. Meade*, 72 Pa. D. and C. Reports 306); and that a man or a corporation was a Communist or a Communist sympathizer (*Spanel v. Pegler*, 160 F. 2d 619 (7th Cir. 1947). See also *Commonwealth v. Canter*, 269 Mass. 359, 168 N. E. 790, upholding a conviction for criminal libel against a defendant who had headed a procession carrying a placard with the words, "Fuller—Murderer of Sacco and Vanzetti."

Glass Works v. Cub Fork Coal Co., 287 U. S. 474; **Maxwell v. Dow**, 176 U. S. 581, 598.

The Times seeks to circumvent these cases—and the 7th Amendment—by citing inapposite cases dealing with review here of state court conclusions as to a **federal** right where facts inadequately support the conclusion,[22] and cases where the record was "entirely devoid" of evidence to support the state court judgment.[23] As this Court held in **Garner**:

> "As in **Thompson v. City of Louisville**, 362 U. S. 199, inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon **any evidence** which would support a finding that the petitioners' acts caused a disturbance of the peace" (368 U. S. 157, 30 U. S. Law Week 4070, 4071; Emphasis supplied).

Regarding falsity, the statements in the ad have been discussed exhaustively in this brief. The Times was unable to plead truth; and conceded falsity before the trial by its retraction to Governor Patterson and at the trial through the statements of its attorneys. It is surely paradoxical for the Times to assert in this Court that the record is so "devoid" of evidence of falsity as to invoke the certiorari jurisdiction of this Court.

Moreover, this record reveals this ad's devastating effect on respondent's reputation among those who believed it.[24]

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[22] *Norgis v. Alabama*, 294 U. S. 587; *Wood v. Georgia*, 370 U. S. 375; *Craig v. Harney*, 331 U. S. 367; *Pennekamp v. Florida*, 328 U. S. 331. These cases involve state court determinations of questions of discrimination in the selection of a grand jury, and of the existence of a clear and present danger to court procedure.

[23] *Thompson v. Louisville*, 362 U. S. 199 and *Garner v. Louisiana*, 368 U. S. 157.

[24] Courts have easily and effectively dealt with the Times' certiorari argument that the publication was not libelous or in-

It is patently frivolous for the Times to argue that no ordinary person of reasonable intelligence[25] could possibly read this advertisement as referring to the Montgomery police commissioner. Nor is a jury bound by the Federal Constitution to take the Times' construction of these words after its attorneys have completed a sanitizing operation in an attempt to dull the cutting edges of these words.[26]

Beauharnais v. Illinois, 343 U. S. 250 teaches that a libel plaintiff need not be named in the defamatory publication. There the criminal prosecution was for defamation of the entire Negro race.

It is difficult to believe that the Times is serious when it argues that this record is entirely devoid of evidence to support the jury finding that these defamatory words were of and concerning respondent.

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jurious because it was not believed in the community. See e. g. *Reynolds v. Pegler*, 123 F. Supp. 36, 37-38, affirmed 223 F. 2d 429 (2d Cir.), cert. denied 350 U. S. 846:

> "'A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages . . .
>
> "To adopt the contrary view . . . would mean that a defamer gains a measure of immunity no matter how venomous or malicious his attack simply because of the excellent reputation of the defamed; it would mean that the defamer, motivated by actual malice, becomes the beneficiary of that unassailable reputation, and so escapes punishment. It would require punitive damages to be determined in inverse ratio to the reputation of the one defamed."

[25] This is the test everywhere. See *Albert Miller & Co. v. Corte*, 107 F. 2d 432, 435 (5th Cir. 1939), which holds that Alabama cases to this effect accord with libel law generally. See also *Peck v. Tribune Co.*, 214 U. S. 185 (where the wrong person was named); *Grant v. Reader's Digest*, 151 F. 2d 733 (2d Cir. 1945); *Spanel v. Pegler*, 160 F. 2d 619 (7th Cir. 1949); 3 *Restatement of Torts*, § 580, Comments (b) and (c), pp. 205-207.

[26] Authorities in Footnote 25.

The ad sought to, and did, portray criminal and rampant police state activity resulting from the singing of "My Country, 'Tis of Thee" from the State Capitol steps. It sought to portray, and did, a resultant "wave of terror" against innocent persons—expulsion from school; ringing of the campus of Alabama State College with truckloads of police armed with shotguns and tear gas; and padlocking of the dining hall to starve protesting students into submission. And the ad returned to Montgomery in the second quoted paragraph charged that pursuant to the same "wave of terror," those who had arrested King for loitering and speeding also had bombed his home, assaulted his person, and indicted him for perjury.[27]

The effect of this publication was as deadly as intended —to instill in the minds of the readers the conclusion that these acts had been perpetrated by Montgomery city officials, specifically the police commissioner. The Times can suggest no one else except the police, whose massive acts in the public mind are surely the work of the commissioner. The connotation is irresistible—certainly not, as the Times argues, completely devoid of rationality.

Moreover, the jury heard witnesses who made the association. **Hope v. Hearst Consolidated Publications**, 294 F. 2d 681 (2d Cir.), cert. denied 368 U. S. 956; **Chagnon v. Union Leader Corp.**, 103 N. H. 426, 174 A. 2d 825, 831-832, cert. denied 369 U. S. 830.

Respondent sued as a member of a group comprising three city commissioners. Libel suits by members of groups of this size are widely permitted. The decision below accords with the law generally on this point.[28]

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[27] Even Gershon Aaronson of the Times so read "they" as used in this paragraph of the advertisement (R. 1871).

[28] *Hope v. Hearst Consolidated Publications*, 294 F. 2d 681 (2d Cir.), cert. denied 368 U. S. 956. (One of Palm Beach's richest

Accordingly, this record and the decision below present no occasion for this Court to depart from its long imbedded—and constitutionally required—rule that it will not review the facts behind a jury determination embodied in a final state court judgment based on state law. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 243. This Court there refused to upset a jury award of one dollar to a railroad as "just compensation" for condemned property. Its words, as the Times well knows, foreclose revision of the jury award at bar.[29]

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men caught his blonde wife in a compromising spot with a former FBI agent); *Nieman-Marcus v. Lait*, 13 F. R. D. 311 (S. D. N. Y. 1952) (immoral acts attributed to department store's 9 models and 25 salesmen); *National Cancer Hospital v. Confidential, Inc.*, 136 N. Y. S. 2d 921 (libelous article about "hospital" gave cause of action to those who conducted hospital); *Weston v. Commercial Advertisers*, 184 N. Y. 479, 77 N. E. 660 (4 coroners); *Bornmann v. Star Co.*, 174 N. Y. 212, 66 N. E. 723 (charges about a hospital staff with 12 doctors in residence); *Chapa v. Abernethy* (Tex. Civ. App.), 175 S. W. 165 (charges about a posse); *Gross v. Cantor*, 270 N. Y. 93, 200 N. E. 592 (12 radio editors); *Fullerton v. Thompson*, 119 Minn. 136, 143 N. W. 260 (State Board of Medical Examiners, of which there were 9); *Children v. Shinn*, 168 Iowa 531, 150 N. W. 864 (Board of Supervisors); *Reilly v. Curtiss*, 53 N. J. 677, 84 A. 199 (an election board).

Commentators have agreed. See 3 *Restatement of Torts*, Sec. 564 (c), p. 152:

> "[A] statement that all members of a school board or a city council are corrupt is sufficiently definite to constitute a defamatory publication of each member thereof."

And see *Developments in the Law—Defamation*, 69 Harvard L. Rev. 894, et seq.

[29] "One of the objections made to the acceptance of the Constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The 7th Amendment was intended to meet these objections, and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union, and leave it open for those courts to re-examine, in disregard of the

III.

In a desperate effort to secure review in this Court, the Times goes outside this record and footnotes (Petition, p. 19) other libel suits pending in Alabama. With the exception of two brought by the other Montgomery commissioners, all are erroneously and uncandidly labeled "companion cases."

But the effort is as revealing as it is desperate. Clearly, petitioner feels that this case, standing on its own, does not present grounds for review.

These cases are not yet tried. There are different plaintiffs; different defendants; different publications; different communications media; different forums; different attorneys; different issues;[30] no final judgment in any; and a trial on the merits in only one of them. The Times baldly urges this Court to jettison libel laws that have existed since the founding of this Republic, and hold: (a) there is an absolute privilege to defame public officials, at least those living in Alabama; (b) private libel suits for defamation are available to all citizens of the United States in state courts according to state libel laws, but not to persons who happen to hold public office in Alabama; (c) plaintiffs in those cited cases shall be deprived of their rights to have their libel cases heard on their merits.

The Times does not claim here that the jury was motivated by passion or prejudice or corruption or any im-

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rules of the common law, facts tried by juries impaneled in the state courts in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States."

[30] For example, the Times retracted for Patterson, but not for respondent. Obviously, the Times, while guilty of clear inconsistency, has nevertheless in Patterson's case sought to eliminate punitive damages by retraction, as permitted by Alabama statute.

proper motive. Two state courts have found that it was not.

The jury was no doubt struck by the amazing lack of concern and contrition exhibited by the Times' representatives at the trial, and it certainly contrasted their conduct. The Times' attorneys did not plead truth; did not attempt to introduce evidence of truth; suggested in cross-examination of respondent's witnesses that the matter was untrue and would not be believed; stated in open court that truth was not in issue; and could not plead fair comment or privilege. The Times retracted the same matter as erroneous and misleading for another person whom it considered to be "on a par" with respondent. But the secretary of the corporation, who had signed its answers to interrogatories, said that with the exception of the padlocking incident he believed the matters in the ad were not substantially incorrect.

The Times seems to hint to this Court (Petition, p. 20) that because the publication contained statements regarding racial tensions, the law of libel should perforce "confront and be subordinated to" a constitutional privilege to defame. Surely in a field so tense, truthful statements by huge and influential newspapers are imperative. For as this Court said in **Beauharnais**, 343 U. S. 250 at 262:

> "Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion."

The confrontation which the jury hoped to achieve was the confrontation of the Times with the truth.

One whose devotion to free speech and press was second to that of no man quoted with approval:

> "'Newspaper slips are usually the result of reprehensible conduct of members of the defendant's or-

ganization . . . The tendency towards flamboyance and haste in modern journalism should be checked rather than countenanced.' "[31]

The enormity of petitioner's wrong is clear. Hopefully the decision below will impel adherence by this immensely powerful newspaper to high standards of responsible journalism commensurate with its size.

> "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. (Citation.) In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right."[32]

These freedoms are amply protected when a newspaper in a state court can plead and prove truth; can plead and prove fair comment; and can plead and prove privilege. Even when it cannot, it can retract, show its good faith, and eliminate punitive damages.

When it can do none of these, and when it has indeed defamed in a commercial advertisement, no constitutional

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[31] Quoted in Chafee, *Possible New Remedies for Errors in the Press*, 60 Harvard L. Rev. 1, 23 (1946).

[32] Frankfurter J., concurring in *Pennekamp v. Florida*, 328 U. S. 331, 355-356.

right, privilege or immunity expounded by this Court during its entire history shields newspapers from damages in a common law libel suit. Accordingly, petitioner has no right to review here.

IV.

1. Because both courts below held that the Times had made a general appearance,[33] an adequate independent state ground as to jurisdiction over the Times in this suit is a bar to review here. **Herb v. Pitcairn**, 324 U. S. 117, 125-126; **Murdock v. Memphis**, 20 Wall. 590, 626; **Fox Film Corporation v. Muller**, 296 U. S. 207, 210; **Minnesota v. National Tea Company**, 309 U. S. 551, 556-557.

The Times intended to assert, and did, that the trial court was without jurisdiction of the subject matter of this action. This act, alone, is a general appearance in Alabama and in a majority of state courts. In addition, the Times compounded its general appearance by other activities in the Alabama courts unrelated to the claimed lack of personal jurisdiction.

Petitioner argues that the Alabama Supreme Court has incorrectly interpreted its own decisions, and that the decision below is in error. This is obviously the wrong forum for such an argument.[33]

But even if an examination of state law were appropriate, the court below followed its earlier cases. Alabama has held, as have other states, that there is a clear distinc-

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[33] A state court's interpretation of its own case law is binding here. *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651, 655; *Guaranty Trust Company v. Blodgett*, 287 U. S. 509, 513; *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134.

Texas, for example, long provided that any appearance at all was a general appearance. *York v. Texas*, 137 U. S. 15, 20.

tion between jurisdiction of the person and subject matter. **Constantine v. Constantine**, 261 Ala. 40, 42, 72 So. 2d 831. Alabama courts have held that a party's appearance in a suit for any purpose other than to contest the court's jurisdiction over the person is a general appearance.[34]

The Alabama cases cited by the Times do not conflict with the decisions below. One case holds that a request for extension of time to file pleadings is not a general appearance;[35] another recognized that defendant might have converted a special appearance into a general appearance, but held that even so a circuit court had authority to set aside a default judgment within thirty days, and denied an extraordinary writ;[36] a third involved a limited attack on "the court jurisdiction over the person of the defendant;"[37] and the last did not even consider the question, since apparently neither the trial judge nor the parties had noticed it.[38]

Moreover, there is nothing novel about the Alabama holding of general appearance. This Court in such cases as **Western Loan & Savings Company v. Butte, et cetera, Mining Company**, 210 U. S. 368, 370 and **Davis v. Davis**,

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[34] *Kyser v. American Surety Company*, 213 Ala. 614, 616, 105 So. 689; *Blankenship v. Blankenship*, 263 Ala. 297, 303, 82 So. 2d 335; *Thompson v. Wilson*, 224 Ala. 299-300, 140 So. 439; *Aetna Insurance Company v. Earnest*, 215 Ala. 557, 112 So. 145. And see *Vaughan v. Vaughan*, 267 Ala. 117, 121, 100 So. 2d 1:

> "[R]espondent . . . by not limiting her appearance and by including non-jurisdictional as well as jurisdictional grounds in her motion to vacate has made a general appearance and has thereby waived any defect or insufficiency of service."

[35] *Ex Parte Cullinan*, 224 Ala. 263, 139 So. 255.

[36] *Ex Parte Haisten*, 227 Ala. 183, 149 So. 213.

[37] *St. Mary's Oil Engine Company v. Jackson Ice & Fuel Company*, 224 Ala. 152, 155, 138 So. 834.

[38] *Harrub v. Hy-Trous Corp.*, 249 Ala. 414, 31 So. 2d 567.

305 U. S. 32, 42, as well as leading text writers,[39] and the majority of the jurisdictions of this country have recognized the binding effect of this rule.[40]

Petitioner argues that the general appearance ground is an untenable non-federal one. Its cases simply do not support its contention. No novel state procedure, of which a party could not fairly be deemed to have been apprised, thwarted all means of raising a federal question.[41] Nor is the Alabama rule—in accord with the majority one—an "arid ritual of meaningless form."[42] Clearly beside the point is a case where an admitted special appearance by a party, an officer appointed to run the railroads for the federal government, was not deemed by the state court to be a special appearance for his successor.[43]

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[39] *Restatement of Conflicts*, § 82, Comment (b); and Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. of Chicago L. Rev. 569, 575:

> "The mere appearance of a defendant in a lawsuit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power."

[40] 25 A. L. R. 2d 835, 838 and 31 A. L. R. 2d 258, 265.

New York itself, prior to statutory amendment, held in *Jackson v. National Grain Mutual Liability Company*, 299 N. Y. 333, 87 N. E. 2d 283, 285:

> "Under its special appearance, the defendant company could do nothing but challenge the jurisdiction of the Justice's court over its person . . . (citation). Hence by its attempt to deny jurisdiction of the subject of the action, the company waived that special appearance and submitted its person to the jurisdiction of the court."

Civil Practice Act, § 273 (a) was necessary to enable a litigant to combine in New York an attack on jurisdiction of the person and of the subject matter without appearing generally in the action. *Ray v. Fairfax County Trust Company*, 186 N. Y. S. 2d 347.

[41] *NAACP v. Alabama*, 357 U. S. 449.

[42] *Staub v. City of Baxley*, 355 U. S. 313, 320.

[43] *Davis v. Wechsler*, 263 U. S. 22.

Nor do petitioner's cases (p. 24) support the preposterous contention that even if there had been jurisdiction by consent because of the general appearance, the commerce clause forbids its exercise. These cases simply hold that a carrier must be given an opportunity to make a seasonable objection to court jurisdiction, and cannot be deprived of doing so by state machinery making a special appearance a general one. Cf. **York v. Texas**, 137 U. S. 15, 20. Alabama does permit a special appearance, and does not prevent a "seasonable motion." But when a foreign corporation makes, instead a general appearance, the commerce clause does not bar the exercise of court jurisdiction by consent.

2. Even if the Times had not made a general appearance in this case, effective service of process is based on decisions of this Court so explicit as to leave no room for real controversy. Accordingly, there would be no occasion for review even if there were no general appearance. **Palmer Oil Corp. v. Amerada Corp.**, 343 U. S. 390.

The crucial test is simple. Did the Times have sufficient business contacts with Alabama so that suit against it there accorded with traditional concepts of fairness and orderly administration of the laws? **International Shoe Company v. Washington**, 326 U. S. 310, 319. The court below, and indeed the trial court, after painstaking analysis of the jurisdictional facts of record, held that there were sufficient contacts. The qualitative functions of a newspaper outlined in **Consolidated Cosmetics v. DA Publishing Company**, 186 F. 2d 906, 908 (7th Cir. 1951), were carried on in Alabama.

The Times plainly maintained an extensive and continuous pattern of business activity in Alabama at least since 1956. The resident string correspondents and staff correspondents, who repeatedly came into Alabama, were a

unique and valuable complement to the news gathering facilities of the Associated Press and United Press and other wire services upon which smaller newspapers rely. Such widespread news gathering facilities unquestionably increase the scope and detail of the Times' news columns, and enhance, accordingly, its prestige, its circulation, and the prices which it can command in the advertising market. In turn, these far-flung news gathering tentacles subject the Times to potential suit in the states into which they reach. If financial reward comes to the Times from its on-the-spot news coverage in Alabama, it is fair that citizens of Alabama should be able to sue the Times here when it has wronged them.

Scoffing at the quantitative size of its business activities in Alabama, the Times apparently ignored the most recent pronouncement of this Court in **Scripto v. Carson**, 362 U. S. 207, cited by the courts below. **Scripto** derived less than half of the revenue from Florida which the Times has derived from Alabama—and regular employees of the Times have combined their efforts with those of independent dealers to produce this result.

One contract negotiated entirely by mail with a predecessor company gave California sufficient contact with a successor insurance company. A default judgment against it was upheld. **McGee v. International Insurance Company**, 355 U. S. 220.[44] Mail transactions alone enabled a Virginia Securities Commission to regulate an out-of-state insurance company. **Travelers Health Association v. Virginia**, 339 U. S. 643. And this Court, as noted in the decision below, commented upon more enlightened concepts resulting in expanded scope of state jurisdiction over foreign corporations. **McGee v. International Insurance**

[44] Noteworthy is the fact that the foreign corporation held amenable to California process had never solicited or done any insurance business in California apart from the policy involved.

Company, 355 U. S. 220, 222-223. Moreover, state activity through the means of independent contractors, as distinguished from agents or employees, is without constitutional significance. **Scripto v. Carson**, 362 U. S. 207, 211. The Times does not cite **Scripto**, but it is nevertheless the law.

Justice Black's dissenting opinion in **Polizzi v. Cowles Magazines**, 345 U. S. 663, 667, considered a magazine publisher subject to Florida libel suit, under old or new concepts, when its only contact there was two circulation road men who checked retail outlets in a multi-state area which included Florida. Presumably no reporting or advertising solicitation was carried on. Mr. Justice Black's opinion, which has been widely quoted as expressive of the prevailing view, found it manifestly unfair to make the plaintiff "bring his libel suit in a federal district court in the corporation's home state of Iowa . . . . [and not] in a federal court in the state where Polizzi lived and where the criminal charges were likely to do him the most harm" (345 U. S. 663 at 668).

McKee, an Alabama resident, conducted all of the usual activities of a stringer for the New York Times. In addition, he performed the delicate task, to which he "naturally" fell heir, of investigating respondent's demand for retraction. The Times was efficaciously brought into court by service on McKee. It is inconceivable, for example, that if while helping Harrison Salisbury obtain material for his Alabama stories, Don McKee had run an automobile into a plaintiff, the Times could have escaped lisbility by maintaining that McKee was an independent contractor.

Similarly substituted service under the Alabama statute[43] was valid. Alabama business activity of the Times pre-

[43] Title. 7 § 199 (1), Code of Alabama.

ceded and followed the printing of this libelous material in New York. The ad itself was supposedly cleared on the basis of prior news gathering; it was later sent into Alabama by the Times, with a carrier as its agent, freight prepaid, with title passing on delivery to the consignee. Thence the issue went to newsstands for sale to the Alabama public, in accordance with the longstanding business practice of the Times.

Scripto v. Carson, 362 U. S. 207, lays to rest the significance of any contention that sales to the public in Alabama were through the medium of independent contractors. It is not necessary for this Court to reach the question of whether isolated newsstand sales, disconnected with any other business activity in Alabama, would be a sufficient contact to sustain substituted service. This is not the case. For the Times has also solicited advertising and gathered news in a systematic and continuous fashion, and has thereby established a firm business connection with Alabama.[46]

Due process and the commerce clause do not immunize the Times from Alabama suit.

As **Polizzi** makes clear, newspapers are not to be in a special category. When other corporations may be sued in a foreign jurisdiction, so may they on similar facts.

Hanson v. Denckla, 357 U. S. 235, relied upon by the Times as contrary to the decision below, is easily dis-

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[46] A remarkably similar case is *WSAZ v. Lyons*, 254 F. 2d 242 (6th Cir. 1958), cited by the courts below. There the court upheld a Kentucky libel judgment against a foreign television station which had beamed the libelous television matter into Kentucky from outside the state. Service was had under a Kentucky statute covering causes of action "arising out of" or "connected" with the doing of business by foreign corporations in Kentucky. The court cited *McGee* and *International Shoe*. Moreover, it held irrelevant the fact that Kentucky produced only 1.03 per cent of the total annual advertising revenue.

tinguishable. As this Court pointed out, there was no solicitation of business in Florida by the foreign corporation, either in person or by mail. In the case at bar the Times solicited business in both manners. The cause of action in **Hanson v. Denckla** did not arise out of an act done or transaction consummated in the forum. On the contrary, this cause of action arose out of the very distribution of the newspapers by the Times in Alabama. Surely the Times cannot contend that its introduction of these newspapers in Alabama was involuntary. The foreign corporation in **Hanson v. Denckla** had received no benefit from the laws of the forum. The manifold business activities of the Times—news gathering, solicitation of advertising and distribution—have received the protection of Alabama laws.

In a final paragraph (Petition, pp. 29-30) the Times suggests that even though it might be amenable to suit in Alabama under due process standards, the commerce clause nevertheless bars the Alabama action. The most recent decision of this Court cited in support of this startling proposition was handed down in 1932. It seems scarcely necessary to observe that this Court, which has developed enlightened standards giving expanded scope to jurisdiction over foreign corporations in such cases as **International Shoe, McGee, Travelers Health** and **Scripto** will not grant review to turn the clock back to 1932, and invoke the rigid concepts of earlier days under the aegis of the commerce clause.

Accordingly, even without a general appearance, the Times would have presented no unsettled federal question of jurisdiction for review by this Court on certiorari.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, M. Roland Nachman, Jr., of Counsel for Respondent, and a member of the bar of this Court, hereby certify that I have mailed copies of the foregoing Brief and of Respondent's Brief in No. 609, Abernathy v. Sullivan, air mail, postage prepaid, to Messrs. Lord, Day & Lord, Counsel for Petitioner, at their offices at 25 Broadway, New York, New York.

This ..... day of December, 1962.

.....

M. Roland Nachman, Jr.,
Of Counsel for Respondent.